U.S. Department of Labor

Office of Administrative Law Judges
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CASE NOS.: 2004-LHC-2762
2004-LHC-2763
2004-LHC-2764

OWCP NOS.: 07-164170
07-162217
07-158538

IN THE MATTER OF

THELMA V. MOBLEY,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS,
Employer

APPEARANCES:

Bryan Duhe, Esq.
On behalf of Claimant

Paul B. Howell, Esq.
On behalf of Employer/Carrier

Before: CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by Thelma M.

Mobley (Claimant) against Northrop Grumman Ship Systems (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on April 21, 2005 in Mobile, Alabama.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced one exhibit (a job application for Barnhill's buffet), and a joint exhibit (a letter from the District Director denying Section 8 (f) relief.[1] Employer introduced 44 exhibits which were admitted including various DOL forms (LS-1, 18, 200, 202, 203, 206, 207, 215, 280); Claimant's personnel and earnings records; reports of accidents; choice of physician statement; petition for Section 8 (f) relief; denial of Section 8 (f) relief; Claimant's response to interrogatories and deposition; Employer infirmary records; medical records from Dr. Rick Hoover, Chris E. Wiggins, Guy L. Rutledge, Jim K. Hudson; vocational reports from Mr. Joe H Walker and Tommy Sanders, and Claimant's report of post-injury earnings.

Rather than filing post-hearing briefs, the parties argued orally at the conclusion of the hearing. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS[2]

At the commencement of the hearing the parties stipulated and I find:

1. During the course and scope of his employment as an employee of Employer Claimant suffered three accidents. The first accident of September 13, 2000 resulted in an injury to her right shoulder. The second

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits- CX-___, p.___; Employer exhibits- EX-___, p.___; Administrative Law Judge exhibits- ALJX-__; p.___; Joint exhibit- JTX-_____.

[2] The stipulations were set forth for the most part in ALJX-1.

accident of July 26, 2001 resulted in an injury to her right knee. The third accident of April 24, 2002 resulted in an injury to her left shoulder.

2. Employer was advised of the injuries on October 5, 2000; November 1, 2001, and April 26, 2002 and filed notices of controversion on October 16, 2001; December 7, 2001 and June 24, 2002. (EX-10).

3. Informal conferences were held on February 6, 2002, and October 31, 2002.

4. Claimant's average weekly wages at the time of the September 13, 2000; July 26, 2001; and April 24, 2002 accidents were $624.37, $681.67, and $628.06 respectively. (EX-5).

5. Claimant's dates of maximum medical improvement for the three injuries were as follows:

> September 13, 2000 accident-July 5, 2001; July 26, 2001 accident-May 8, 2002; and April 24, 2002 accident- August 20, 2003.

6. Employer paid the following disability benefits for the three accidents:

> Accident of September 13, 2000:
> temporary total from November 1, 2000 to November 20, 2000; February 21, 2001 to May 6, 2001 at $416.25 per week. (EX-6, 7).
>
> Accident of July 26, 2001:
> temporary total from November 13, 2001 to November 15, 2001; November 21, 2001 to January 16, 2002, and February 6, 2002 to March 3, 2002 at $454.46 per week.
> Permanent partial-2% to leg. (EX-16-18).
>
> Accident of April 24. 2002:
> temporary partial from June 14, 2002 to May 21,2003 at $260.04 per week; temporary total from May 22, 2003 to November 5, 2003 at $418.71 per week; and permanent partial disability from November 6, 2003 to present at $268.82 per week. (EX-25, EX-26).

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and Extent of Disability.

2. Section 8 (f) relief.

3. Attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a 49 year old female born on July 22, 1955. Claimant has a GED and a certificate in cosmetology with past work experience as a painter for Employer in 1978 and 1979, packer for Moss Point Glove in 1988 and 1989, salesperson for Wal-Mart from 1989 to 1991, and a painter for Employer from March 20, 1992 until her third injury on April 24, 2002. (EX-1; Tr. 35, 36). This worked involved light to medium physical, semi-skilled activity. (EX-42).

On September 13, 2000, while painting bunks in a berthing area, Claimant experienced severe right arm pain. (EX-2, EX-3). Claimant saw orthopedist, Dr. Wiggins on September 26, October 17, 31, November 6, 13, 20, 27, 2001; January 29, February 20, 2001, during which time he treated Claimant conservatively. When shoulder problems persisted, Dr. Wiggins operated on February 22, 2001 repairing a torn right rotator cuff. (EX-11, p.18). Following surgery, Claimant saw Dr. Wiggins on March 5, 14, April 16, 30, June 4, 25, July 16, 2001, after which Dr. Wiggins found Claimant to be at maximum medical improvement with permanent restrictions of no continuous overhead work and no lifting above the shoulder level greater than 15 pounds. (EX-38, p.28). Claimant was apparently off work from November 1 through November 20, 2000, and again from February 21 through May 6, 2001, due to the first accident.

Claimant returned to work and worked without incident until July 26, 2001, when she suffered a second accident. On that date, Claimant was on painting on her knees and apparently hit her right knee on deck knots causing severe knee pain. (EX-13, p.1; EX-14, p.1). Claimant went to a general practice physician, Dr.

Hoover who referred Claimant to orthopedist, Dr. Hudson whom Claimant saw on January 16, 28, February 6, 2002, during which time he provided conservative care and ordered an MRI which showed an anterior cruciate ligament sprain or tear, a tear of the medial and lateral meniscus, and a large joint effusion. (EX-37, EX-40, p.6). This was followed by arthrocopy with medial, lateral and patellar chrondroplasty and partial lateral meniscectomy on February 7, 2002. (EX-40, p.14). After surgery, Claimant saw Dr. Hudson on February 26, March 20, April 10, May 8, 2002, at which point Claimant was placed at maximum medical improvement with restrictions of no crawling, squatting or kneeling and minimal ladder climbing. (EX-40, pp.31, 34).

Claimant was off work due to the second injury on three separate occasions: November 13 to 15, 2001, November 21, 2001 through January 16, 2002, and February 6, 2002 through March 3, 2003. Claimant returned to work on March 4, 2002 and worked without a problem until her third accident of April 24, 2002. On that date, Claimant was working on a ship when she tripped over a door way with a bucket of paint in her hand. Claimant fell on her knees, left arm and shoulder. (EX-21, p. 1, EX-22, EX-30). Claimant selected Dr. Wiggins as her treating physician. (EX-24). Claimant saw Dr. Wiggins on June 14, August 15, 29, September 12, 27, 2002; January 6, 13 , March 7, 19, 28, April 3, May 14, 15, 2003, during which he treated Claimant for a left rotator cuff injury and tendinitis. On May 22, 2003 Claimant was hospitalized and underwent a NER acromioplasty left shoulder and Mumford resection left distal clavicle. (EX-30, p. 32). Following surgery, Dr. Wiggins saw Claimant on June 9, 30, July 30, 2003 and reaching maximum medical improvement on August 20, 2003, receiving a !0% permanent partial disability of the left upper extremity with no pushing lifting or pulling over 30 pounds and no over shoulder level wok with the left arm. (EX-38, p.67).

B. Claimant's Testimony

Claimant's testimony centered on her injuries and inability to work. Claimant described her first injury of September 13, 2000 as occurring while she was using a roller to paint berthing areas. Claimant began to experience increasing arm pain which required her to see Dr. Wiggins. When conservative treatment failed to relieve the pain, Dr. Wiggins operated on Claimant's right shoulder. This was followed by a period of considerable therapy after which Claimant eventually returned to work despite being unable to hold up her right arm for any length of time and continuing to experience severe pain. (Tr. 22-25).

Claimant described the second injury as occurring while she was working on her knees on a warped ship deck. In the process of cleaning this deck, Claimant continued to bump her right knee which swelled up and eventually required surgery and has restricted her ability to bend and walk either at fast pace or far distances. (Tr. 28). Claimant nonetheless returned to work and worked for only about 5 weeks before suffering a third injury, when her legs gave out due to excessive ladder climbing and she fell while carrying paint injuring her left arm. Claimant thereafter, had surgery on her left collar bone followed by therapy.

Claimant testified that as a result of her surgeries she has had to increase her pain medication from one Lortab 5 to Lortab 7 to Lortab 10 every 4 hours. The medication in turn while reducing pain makes her woozy, wobbly, and disoriented. (Tr. 26). In addition, she has had to undergo additional therapy to counteract scar tissue formation which has limited arm mobility. (Tr. 27, 33).

Claimant testified she is unable to do her past work as a beautician because it required standing all day and lifting her arms for 35 to 40 minutes at a time. She is unable to work as a painter because of an inability to work overhead. (Tr. 36).

Concerning the jobs identified by vocational expert, Tommy Sanders, Claimant testified that she applied for a buffet attendant at Barnhill's, but that they would not hire her with her physical limitations. Claimant applied for a convenience store cashier position at Shell Petroleum, but was told she could not have an application due to a change in management. (EX-38, p. 82; Tr. 36-39). Claimant did not apply for the seamstress position identified by Sanders, because it paid only $6.00 per hour and was 40 miles one way from her home. (Tr. 40).

On cross, Claimant admitted applying only to Barnhill's due to severe pain and stated that while at home she does household chores such as making her bed, washing dishes, sweeping, vacuuming, doing laundry, feeding the dog, husband, children and grandchildren, but that she has to take her time doing such because of pain and pain medications. Claimant testified that instead of taking 45 minutes to do such activities it will take her 4 hours to perform such work resting frequently in between activities. (Tr. 44-62). Further, she is unable to do seamstress work due to repetitive motion or arms and shoulders which is quite painful. (Tr. 63, 69). Claimant testified that she has not been willing to work outside her home due to frequent shoulder pain which is at a level 5 or 6 out of 10 even with use of medication which reduces the intensity. (Tr. 58-60).

C. Vocational reports of Joe Walker and Tommy Sanders

Vocational expert, Joe Walker, provided rehabilitation services for Claimant through DOL following her first injury which included counseling. A review of Mr. Walker's reports show Claimant made a successful return to work following the first two injuries working within the doctor prescribed guideline. (EX-41).

Vocational expert, Tommy Sanders rendered a vocational assessment and labor market survey on May 30, 2002, in which based on Claimant's restrictions of no continuous overhead work, no lifting above shoulder level greater than 15 pounds, no kneeling, crawling or squatting, limited climbing, he found Claimant able to work as a sales clerk, cashier, convenience store clerk, fuel booth attendant, security guard, receptionist and telephoning answering service operator and identified the following openings: Pinkerton security guard (20-40 hours per week, wages of $5.90 to $6.50 per hour, gate guard work with no kneeling, squatting, crawling, overhead work and negligible lifting); E-Z serve cashier (20 to 38 hours per week, $5.50 per hour, occasional , pushing and pulling and lifting 6 to 18 pounds, occasional sitting, bending, stooping, frequent standing and walking and lifting of 3 to 5 pounds); Munro Petroleum store cashier (36 hours per week, $6.00 per hour, periodic stocking, occasional lifting to 10 pounds, occasional sitting, bending, stooping, frequent standing, walking and handling). (EX-42 pp. 3-5).

In a letter dated October 29, 2003, Sanders informed Claimant about the following openings: seamstress a Tessa's Sewing Shop (Tillman's Corner, west of Mobile) ($6.00 per hour, operating a sewing machine to make clothes alterations, lifting 5 to 10 pounds); buffet attendant at Barnhill (20-40 hours per week, $5.15 per hour, occasional lifting of 10 to 15 pounds, occasional bending, stooping with frequent standing and walking); convenience store cashier at Shell Petroleum (40 hours per week, $6.50 per hour, lifting occasionally 10 pounds, occasional bending/stooping with frequent standing/walking/handling and occasional sitting). (EX-42, p. 5 (a), 5 (b)). In a subsequent report of November 4, 2003, Sanders identified additional jobs of desk clerk at the Ramada in Ocean Springs (40 hours per week, $5.50 per hour); gate guard a Swetman Security (40 hours per week, $6.68 per hour). (EX-42, p.5(c)-5 (f)).

In a report of May 27, 2004, Sanders had Dr. Wiggins approve the seamstress and convenience store cashier positions for Claimant. (EX-42, pp. 7). In a report of February 18, 2005 Sanders included additional positions as appropriate for Claimant: cashier at Fred Discount Store (40 hours per week, $5.15

per hour, operating a cash register and bagging merchandise with frequent use of upper extremities, frequent standing, and walking and occasional bending; cashier at Hudson's (40 hours per week, $6.50 per hour, operating a cash register, occasional lifting of 10 pounds and frequently 5 pounds, pushing and pulling 5 pounds, frequent standing/walking/use of upper extremities and slight forward flexion when scanning and bagging); cashier at Classy Chassis Car Wash (40 hours per week, $5.15 per hour, operating cash register, stock magazines and car cleaning products, infrequent bending, lifting 1 to 5 pounds and frequent use of upper extremities). (EX-42, pp.12, 13).

IV. DISCUSSION

A. Contention of the Parties

The parties agree that the sole issue to be determined is the nature of extent of Claimant's disabilities after August 20, 2003 when Claimant reached maximum medical improvement from her last injury. Claimant contends that Claimant is entitled to permanent total disability from that date forward. Employer on the other hand contends that Claimant has an earning capacity from August 20, 2003, and in thus, entitled to only permanent partial disability.

Claimant argues that Claimant's injuries have all resulted in substantial permanent limitations which have prevented Claimant from doing any work outside of her home and have limited what Claimant can even do in her own home. Claimant is unable to work due to severe pain and side effects of medication which dosage is significant.

Employer argues that all Claimants' doctors have released her to work with restrictions. However, Claimant has made no effort since August, 2003, to find work. Vocational expert, Sanders identified jobs she could do effective August, 2003, including that of seamstress, buffet attendant and convenience store cashier. Claimant's activity around the house is inconsistent with her claim of an inability to work and that she has an earning capacity of $235.33 per week. Further, Employer is entitled to Section 8(f) relief because the injuries of September 13, 2000, and July 26, 2001, combined with and contributed to the affects of her injury of April 24, 2002 to make Claimant substantially more disabled than if she had only the left shoulder injury of April 24, 2002 alone reducing her capacity from medium work to only light work making $235.33 per week.

The Director's position is set forth in ALJX-2 in which Section 8 (f) is denied on the premise that Employer failed to establish that Claimant's current disability was materially and substantially greater than that which would have occurred from the April 24, 2002 injury alone.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.,* 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); *Todd Shipyards Corporation v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Atlantic Marine, Inc., and Hartford Accident & Indemnity Co., v. Bruce,* 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc., v. Britton,* 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (d) and that the proponent of a rule or position has the burden of proof *Director, OWCP, v. Greenwich Collieries,* 512 U.S. 267, 114 S. Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

In the present case, I was impressed with Claimant's credibility and credit her assertions about severe pain and the inability to work. Claimant is on substantial pain medication which has debilitating side effects rendering Claimant unable to work at a steady pace and requiring frequent breaks. I was impressed with her work record, particularly her return to work following substantial injuries.

C. Nature and Extent of Injury

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co*., 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached so that a claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping,* 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp*., 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers,* 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.,* 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.,* 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co., v. Hayes,* 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv., v. Director, Office of Worker's Comp. Programs,* 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment *Elliot v. C&P Telephone Co.,* 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner,* 661 F.2d at 1038; *P&M Crane,* 930 F.2d at 430; *Clophus v. Amoco Prod. Co.,* 21 BRBS 261 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(D.C. Cir. 1991); *Rinaldi v.*

General Dynamics Corp., 25 BRBS 128 (1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment *Darden v. Newport News Shipbuilding & Dry Dock Co.,* 18 BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market *Conover v. Sun Shipbuilding & Dry Dock Co*., 1 BRBS 676, 679 (1979). If employer does not offer suitable work at its facility, the Fifth Circuit in *Turner,* established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that a claimant is reasonably capable of performing, are these jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

661 F.2d at 1042; *P&M Crane*, 930 F.2d at 430.

If the employer meets its burden by establishing suitable alternative employment, the burden shifts back to a claimant to prove reasonable diligence in attempting to secure some type of alternate employment shown by the employer to be attainable and available. *Turner*, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. *Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987). Moreover, if claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. *Roger's Terminal & Shipping Corp., v. Director, OWCP*, 748 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986). If a claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. *Turner,* 661 F.2d at 1043; *Southern v. Farmers Export Co*., 17 BRBS 64 (1985).

Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. *Elliot v. C & P Tel. Co.,* 16 BRBS 89, 92 (1984); *Equitable Equip. Co., v. Hardy*, 558 F.2d 1192 (5th Cir. 1977). Claimant's credible complaints of pain alone may be enough to meet this burden. *Golden v Eller & Co*., 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980). If a claimant's physical injury leads to psychological injuries, a finding of permanent total disability may be warranted. *Parent v. Duluth, Missabe & Iron Range Railway Co.,* 7 BRBS 41 (1977); *Mitchell v. Lake Charles Stevedores,* 5 BRBS 777 (1977). Once a claimant makes a *prima facie* showing the burden shifts to the employer to show suitable alternative employment. *Clophus v. Amoco Pro. Co.,* 21 BRBS 261 (1988). A failure to prove suitable alternative employment results in a finding of total disability. *Manigualt v. Stevens Shipping Co.,* 22 BRBS 332 (1989); *MacDonald v. Trailer Marine Transp. Corp.,* 18 BRBS 259 (1986).

In this case, I am convinced that since August 20,2003, Claimant has had permanent work impairments, including severe shoulder pain and substantial side effects from pain medication which has rendered her unable to perform not only her past work, but all work identified by the vocational expert. Indeed, the vocational expert did not take into account these factors when considering Claimant's ability to work. As such, I find Claimant entitled to permanent and total disability from August 20, 2003 at the stipulated average weekly wage of $628.06 with a corresponding weekly compensation rate of $418.71.

E. Section 8 (f) Relief

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone *Lockheed Shipbuilding v. Director, OWCP,* 951 F.2d 1143, 1144, 25 BRBS 85 (CRT) (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v Kaiser Aluminum & Chemical Sales,* 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP, v. Berkstresser,* 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir.1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP,* 851 F.2d 1314, 1316-17, 21 BRBS 150 (CRT) (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp., v. Director, OWCP,* 125 F.3d 884 (5th Cir. 1997); *Director, OWCP, v. Ingalls Shipbuilding, Inc.,* 125 F.3d 303 (5th Cir.). It is the employer's burden to establish the fulfillment of each of the above elements. *See Peterson v. Colombia Marine Lines,* 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards,* 18 BRBS 237 (1986).

In establishing the occurrence of a second injury to the employee, it has been held that a work-related aggravation of an existing injury constitutes a compensable injury for purposes of section 8(f). *Ashley v. Tide Shipyard Corp.,* 10 BRBS 42, 44 (1978); *Foundation Constructors v. Director, OWCP,* 950 F.2d 621, 625, 25 BRBS 71 (CRT) (9th Cir. 1991), *aff'g* 22 BRBS 453 (1989). However, there must be a showing of actual aggravation. If the results are nothing more than a natural progression of the preexisting condition, it cannot constitute the required second injury. *Jacksonville Shipyards v. Director, OWCP,* 851 F.2d 1314, 1316-17, 21 BRBS (CRT) (11th Cir. 1988) (en banc), *aff'g Stokes v. Jacksonville Shipyards,* 18 BRBS 237 (1986); *Souza v. Hilo Transportation & Terminal Co.,* 11 BRBS 218, 223 (1979). Additionally, the Board has upheld the denial of Special Fund relief where the ALJ has found the aggravation too minimal to have contributed to the employee's ultimate disability. *Stokes,* 18 BRBS at 241. Claimant clearly sustained a subsequent injury when he injured his leg, causing an altered gait, which lead directly to the aggravation of his pre-existing back impairment.

In this case there is no question that Claimant's third injury combined with Claimant two pre-existing work injuries to make his medical condition more severe that it would have been absent the two prior permanent injuries resulting in lifting, bending, stooping and climbing limitations. As a result of the third injury, Claimant cannot only work as a painter, but she is also precluded from performing other jobs, on a sustained and consistent basis. Employer is thus entitled to Section 8 (f) relief, commencing 104 weeks after August 30, 2003.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act for the period from August 20, 2003 and thereafter for a period of 104 weeks after which the Special Fund is liable for compensation payments pursuant to Section 908 (f) of the Act. Compensation is to be based upon an average weekly wage of $628.06 with a weekly compensation rate of $418.71.

2. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of her work-related injuries pursuant to Section 7(a) of the Act.

3. Employer shall pay Claimant interest on accrued unpaid compensation benefits as described in paragraph 1, above. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE